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MEMORANDUM

TO: Committee on Legal Services

FROM: Sarah Lozano, Office of Legislative Legal Services

DATE: December 6, 2022

SUBJECT: Rules of the Air Quality Control Commission, Department of Public Health and Environment, concerning the control of lead hazards, 5 CCR 1001-23 (LLS Docket No. 220080; SOS Tracking No. 2021-00517).¹

Summary of Problem Identified and Recommendation

Section 25-7-1102 (2), C.R.S., defines "child-occupied facility" for the purposes of part 11 of article 7 of title 25, C.R.S., which governs lead-based paint abatement in child-occupied facilities and target housing. Section 25-7-1102 (2)(a)(III), C.R.S., defines a "child-occupied facility" as buildings and portions of buildings that are visited by a child "on two or more days within any week ... with each such visit totaling **six or more hours.**" (**Emphasis added**) However, Regulation Number 19 Part A II.B.13.a.(iii) of the Air Quality Control Commission (commission) defines "child-occupied facility" as buildings and portions of buildings that are visited by a child "on two or more days within any week, with each such visit totaling **three or more hours.**" (**Emphasis added**)

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I)(A), C.R.S., the rules discussed in this memorandum will expire on May 15, 2023, unless the General Assembly acts by bill to postpone such expiration.

Because Regulation Number 19 Part A II.B.13.a.(iii) conflicts with statute, we recommend that Regulation Number 19 Part A II.B.13.a.(iii) of the rules of the commission concerning the control of lead hazards not be extended.

Analysis

The commission's definition of "child-occupied facility" conflicts with statute by requiring that a child's visit total only three or more hours when the statutory definition requires a child's visit to total six or more hours.

"Child-occupied facility" is defined in section 25-7-1102 (2), C.R.S. That provision states:

25-7-1102. Definitions. As used in this part 11, unless the context otherwise requires:

(2) (a) "Child-occupied facility" means a building or portion of a building that:

(I) Was constructed prior to 1978;

(II) Is visited regularly by the same child who is under seven years of age;

(III) Is visited by such child on two or more days within any week, consisting of the period from Sunday through the following Saturday, with each such visit totaling **six or more hours**; and

(IV) Is visited by such child a total of at least sixty hours in one year.

(b) "Child-occupied facility" includes, but is not limited to, any day-care center, preschool, or kindergarten classroom constructed prior to 1978.

(Emphasis added)

"Child-occupied facility" is also defined in Regulation Number 19 Part A II.B.13.a.(iii). That provision states:

PART A LEAD-BASED PAINT ACTIVITIES

II. Definitions

II.B. Terms

Any terms that are not defined are given the same meaning as in the Air Quality Control Commission's Common Provisions Regulation.

II.B.13. Child-occupied facility

II.B.13.a. Child-occupied facility means a building or portion of a building that:

II.B.13.a.(i) was constructed prior to 1978;

II.B.13.a.(ii) is visited regularly by the same child who is under 7 years of age;

II.B.13.a.(iii) is visited by the same child on two or more days within any week, with each such visit totaling **three or more hours**; and

II.B.13.a.(iv) is visited by the same child a total of at least sixty hours in one year.

II.B.13.b. "Child-Occupied Facility" includes, but is not limited to, day-care centers, preschools, or kindergarten classrooms constructed prior to 1978. **(Emphasis added)**

In reducing the required per visit time from six hours to three hours in Regulation Number 19 Part A II.B.13.a.(iii), the commission promulgated a rule that directly conflicts with the statutory definition of "child-occupied facility". Although the commission has general rule-making authority regarding the regulation of lead-based paint abatement in Colorado,² the commission is not permitted to promulgate rules that conflict with statute.³

Further, the statutes and rules related to lead-based paint abatement are strictly limited to child-occupied facilities and target housing,⁴ and section 25-7-1102, C.R.S., provides definitions for those terms in statute. Therefore, the expansion by rule of one of those definitions – "child-occupied facility" – not only conflicts with the statutory definition, but expands the scope of lead-based paint abatement requirements to apply to facilities that are not subject to the abatement requirements imposed by statute.

Because Regulation Number 19 Part A II.B.13.a.(iii) reduces the required visit time from six hours to three hours per visit in the definition of "child-occupied facility", the rule conflicts with statute.

² See § 25-7-1103 (1), C.R.S.: "The commission shall promulgate rules pursuant to section 24-4-103, C.R.S., as necessary to implement this part 11 under the requirements of the federal "Residential Lead-Based Paint Hazard Reduction Act of 1992", 15 U.S.C. secs. 2682, 2684, and 2686, as amended..."

³ See § 24-4-103 (8)(a), C.R.S.: "Any rule or amendment to an existing rule issued by any agency, ... which conflicts with a statute shall be void."

⁴ See § 25-7-1107, C.R.S.: "Nothing in this article shall be interpreted to affect any facility or location other than a child-occupied facility or target housing."

Recommendation

We therefore recommend that Regulation Number 19 Part A II.B.13.a.(iii) not be extended because the rule conflicts with statute.

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